No. 76-1515

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1977

PACIFIC NORTHWEST BELL TELEPHONE COMPANY,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 549 F. 2d 1313. The opinion of the district court (Pet. App. A) is reported at 378 F. Supp. 297.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 1977. The petition for certiorari was filed on May 2, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a limitation on government liability contained in a permit issued by the United States Army Corps of Engineers is valid.

STATEMENT

Sometime prior to April 12, 1965, petitioner applied to the Secretary of the Army for a permit to lay a submarine cable in Lake Washington, a navigable body of water near Seattle (Pet. App. A-6). Petitioner was required to apply for the permit because the cable constituted an obstruction to navigation, and the creation of such an obstruction in navigable waters of the United States is expressly prohibited by the Rivers and Harbors Act of 1899, 30 Stat. 1151, 33 U.S.C. 403, unless authorized by the Secretary of the Army upon the recommendation of the Chief of the Army Corps of Engineers. The Secretary approved petitioner's application and issued the permit on April 12, 1965 (Pet. App. A-6). As required by 33 C.F.R. 209.130(c)(2)(vii) (1974 rev.), the permit contained a clause absolving the United States from liability for damage to the cable "which may be caused by or result from future operations undertaken by the Government for the conservation or improvement of navigation, or for other purposes * * *" (Pet. 9).

Each year a regatta, called the Seafair Unlimited Hydroplane Regatta, is conducted on Lake Washington (Pet. App. A-7). The sponsors of the 1972 regatta called upon the Coast Guard to place large buoys in Lake Washington in order to mark the course (*ibid.*). The Commandant of the Coast Guard is authorized by 46 U.S.C. 454 to issue regulations to promote safety on navigable waters of the United States during regattas or marine parades, and 33 C.F.R. 62.01-35(a) specifically provides for the establishment of aids to navigation by the Coast Guard to mark the course in such events. Accordingly, the Coast Guard agreed to place buoys to mark the course of the 1972 regatta in Lake Washington, and the sponsors provided the Coast Guard with a detailed survey drawing of the area in Lake

Washington where the regatta was to be held and the buoys to be set (Pet. App. A-7). The survey did not show the location of petitioner's submarine cable (*ibid.*). On July 26, 1972, as the Coast Guard buoy tender FIR was putting one of the buoys in place, the buoy's anchor fouled petitioner's submarine cable, causing damage in the claimed amount of $56,000 (*id.* at A-5, A-7.)

After the Coast Guard refused to pay for the damage, petitioner brought this action under the Suits in Admiralty Act, 41 Stat. 525, as amended, 46 U.S.C. 741 *et seq.*, and the Public Vessels Act, 43 Stat. 1112, 46 U.S.C. 781 *et seq.*, alleging negligence (Pet. 7). The government denied negligence and, as an affirmative defense, alleged that petitioner was precluded from recovery by the express terms of the exculpatory clause in the permit granting petitioner permission to lay the submarine cable in Lake Washington (Pet. App. A-7).

The district court held that the exculpatory clause in the permit was "invalid" because it was "beyond the scope of, or in conflict with" the Suits in Admiralty Act and the Public Vessels Act, "which were designed to subject the United States to maritime tort liability to the same extent as a private person" (Pet. App. A-2 to A-3), and granted summary judgment for petitioner.

The court of appeals reversed (Pet. App. A-4 to A-10). The court observed that "[t]he Public Vessels Act and the Suits in Admiralty Act do not purport to strip the government of the power to control the rights of persons to place obstructions to navigation in navigable waters of the United States. * * * [T]he power of the United States must be held to continue unimpaired to deny permits or, in granting them, to impose conditions that are relevant to the regulatory purpose" (Pet. App. A-8 to A-9). It concluded that the exculpatory clause at issue

in this case was "rational and relevant to the regulatory purpose and falls within the regulatory power" (Pet. App. A-9) and, accordingly, was valid.

ARGUMENT

The decision of the court of appeals is correct and is in accord with that of the only other court of appeals to have considered the issue. See *Boston Edison Co.* v. *Great Lakes Dredge & Dock Co.*, 423 F. 2d 891 (C.A. 1). Review by this Court is not warranted.

1. Petitioner contends (Pet. 11-12, 18-19) that the exculpatory clause at issue here is inconsistent with the general waiver of sovereign immunity contained in both the Public Vessels Act, 46 U.S.C. 781, and the Suits in Admiralty Act, 46 U.S.C. 742. There is no conflict. The waivers of immunity in those Acts remove a jurisdictional defense that the sovereign otherwise could assert, but they leave intact the government's right to assert substantive defenses on the question of liability. See *Feres* v. *United States*, 340 U.S. 135, 140-141.

Petitioner suggests, however, that these statutes express a public policy at odds with the contested clause. But the statutes affirmatively provide that the United States is "entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators, or agents of vessels" (46 U.S.C. 746), and they limit recovery to that which could be had if "a private person or property were involved" (46 U.S.C. 742). See also *Weyerhaeuser S.S. Co.* v. *United States*, 372 U.S. 597, 600; *Canadian Aviator, Ltd.* v. *United States*, 324 U.S. 215, 228; *McMahon* v. *Pan American World Airways, Inc.*, 297 F. 2d 268, 269 (C.A. 5). The Acts look toward placing the United States in the same position as private litigants. There is no suggestion that the United States must go further and leave itself open to liability in situations where private persons would be permitted to limit their liability. Since private persons could condition the grant of an easement by limiting their liability for damage done by them to property installed on the easement,[1] there is no reason why the United States should not be permitted to do likewise. To the contrary, it is established that, in cases arising under analogous provisions of the Tort Claims Act, the United States may obtain, or benefit from, releases of liability. See *Montellier* v. *United States*, 315 F. 2d 180 (C.A. 2); *Matland* v. *United States*, 285 F. 2d 752 (C.A. 3).

2. Petitioner contends (Pet. 12, 17-18), however, that regardless of the United States' general authority to limit its liability, the limitation of liability at issue here was in excess of the Secretary of the Army's authority to insure the safety of navigable waters.

The Secretary of the Army is required in 33 U.S.C. 1 "to prescribe such regulations for the use, administration, and navigation of the navigable waters of the United States as in his judgment the public necessity may require for the protection of life and property, or of operations of the United States in channel improvement * * *." Pursuant to this direction, and to his authority under the Rivers and Harbors Act of 1899, 33 U.S.C. 403, to issue permits for structures built in the navigable waters of the United States,

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[1]Petitioner asserts that the analogy to a private landowner is faulty because the government does not have a fee simple title to the river bottom but only regulates in the exercise of its dominant navigational servitude. The exact extent of the government's legal interest is, however, immaterial. Since petitioner admits that it was required to obtain a permit (Pet. 5), it can hardly argue that no vehicle exists to which conditions may be attached. See generally *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 423-428 (government has broad authority to attach conditions to permits issued pursuant to the federal power over navigable rivers).

the Secretary has issued regulations setting forth the requirements and conditions upon which obstructions may be placed, and work may be performed, in navigable waters, including the requirement that all permits include the condition at issue in this case.

The United States may carry out operations with regard to its responsibilities on navigable rivers, including operations directed at aiding navigation, such as the buoy-mooring that fouled petitioner's cable in this case. The grant of permission to place structures in such waters, and the actual placing of the structures, creates the possibility that the government's operations may be hindered by, or interfere with or damage, those structures. Regulations allocating the risks created by the permit are proper, as the court of appeals noted, to "deal[ ] with problems that the very grant or permit would operate to create".[2] Further, the particular manner in which the Secretary chose to allocate the risks has not been shown to be contrary to the legislative intent. Accordingly, the regulations are "rational and relevant to the regulatory purpose and fall[ ] within the regulatory power" (Pet. App. A-9).

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[2]Petitioner suggests (Pet. 20) on the basis of two cases, *Kelly* v. *United States*, 531 F. 2d 1144, 1148-1149 (C.A. 2), and *De Bardeleben Marine Corp.* v. *United States*, 451 F. 2d 140, 145 (C.A. 5), that those circuits would decide this issue differently from the court of appeals below. The language petitioner considered significant in *Kelly* — that the Suits in Admiralty Act must be given its "plain and ordinary meaning" — merely enunciated a general principle of construction; *Kelly* dealt with the unrelated question whether admiralty jurisdiction extends to a pleasure-vessel accident. Similarly, the dictum in *De Bardeleben* on which petitioner relies, which stated generally the intent of the Suits in Admiralty Act, did not address the question here but rather the quite different question whether the statutory exceptions to the Tort Claims Act are imported into the Suits in Admiralty Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JULY 1977.